

ANSWERS

For Sir James Fowlis of Collingtoun, to the Petition given in to Their Majesties high Commissioner, and the most Honourable Estates of Parliament, by Dame Margaret Areskin Lady Castle-haven.

THE deceas'd Sir James Fowlis of Collingtoun, being first married to Dame Barbara Ainslie, Mother to the now Sir James, who brought with her to that Family, in Money and Land, to the value of 50000 Merks; The Defuncts Father in Contemplation of the Marriage, did dispoise this Estate to his Son, and to the Heirs Male to be procreat of that Marriage, and the Son was obliged to do no Deed that might evacuate the Male Succession; By which Provision, the now Sir James Fowlis, as eldest Son of the Marriage, was a lawful Creditor to his Father, long prior to his entrie in any second Contract with the Lady Castle-haven.

This Family being brought low, and the last Sir James coming to be in great Debt, by reason of the Calamities of the late times, and of his constant adherence to the Royal Family; he did in the year 1670, marry this Sir James his eldest Son, to the eldest Daughter of the deceased John Boyd, with whom he got 20000 pound of Tocher besides 40000 pound Sir James got by that Marriage, and his Father did at that time dispoise to him the Estate of Collingtoun extending to 3600 Merks yearly, whereby it is evident to a Demonstration, that the great Sums this Sir James got by his Lady does far exceed all the Estate that he is now in possession of in the Right of his Father, and by vertue of any disposition from him.

The said Deceast Sir James having in Anno. 1661. Married the Now Lady Castle-haven, beside the special oblidge in her Contract; there is a General Clause by which she is provided to the Liferent of what should be Conquest during the Marriage. And upon this Clause she pursued the now Sir James before the Lords of Session, for the Liferent of all Sums of Money that his Father had applyed during the Marriage with her, for payment of the Debts affecting the Lands of Collingtoun, and wherein the Lords having decided according to the current of Decisions in former Cases, and found that the Lady had no interest in Sums consumed during the Marriage by payment of Debts; She did interpose a protestation for Remeid of Law or Appeal to the Parliament, and thereupon the Interloquitor of the Lords of Session is Rescinded, and the Parliament by a Remit to the Committee of Fines and Forfaultures did find and declare the Estate of the Deceast Lord Collingtoun lyable to the Lady for her Liferent-use of the Annualrents of all Sums acquired by His Father during the Marriage and whereof the Effects were extant the time of the dissolution of the Marriage; whether by payment of Debts Contracted prior to the Marriage, Redeeming of wadsets or otherwayes, and allowed an joint Probation to either Party, before the said Committee for liquidating the Sums so acquired, and for proving, by whose means these Sums were made up, and to make report thereof to the next Session of Parliament.

This Affair having been called before the said Committee, there was a Condescendence given in by the Lady, of the Debts wherein the last Collingtoun stood engaged, and which the Committee by an Interlocutor, 11. March 1691. did sustain as probative for liquidating the Burdens that affected this Estate, the time of the Ladies entering in the said Contract of Marriage, unless that the Defender betwixt and a particular day therein assigned, could prove that any part of these Debts had been payed from the time that they were given up by the late Lord Collingtoun, which was about the year 1657. and before his Marriage with the Lady, which was in anno 1661; but the Committee not having occasion to call this Affair thereafter, there is no further Procedure therein since that time.

There is now a Petition given in to my Lord Commissioner, his Grace, and Honourable Estates of Parliament, by the Lady Castle-haven, and of which the Defender shall not give his Grace and your Lordships the trouble of a needless Repetition, but shall endeavour to make Answer thereto, as he goes through the several Heads thereof.

As to the Preamble, bearing that she was induced to marry the Defenders Father, and brought a considerable Joynture, of 40 Chalders of Victual with her, without any other Retribution than the said Provision in her Contract, in relation to her Liferent of the Conquest.

It is Answered for the Defender, That with all submission my Lady might have forbore to have usher'd in this her Petition with such a narrative, as to her being induced to marry the Defenders Father, whose merit (upon many considerations) did render him a suitable Match to this Lady; and it had been more her Honour to have acknowledged, that the same was the true arise of her free choice of a person of that Worth, then that any sordid and indirect methods were taken to induce her to this Marriage. And as to the Joynture mentioned in the Petition, it is not true that my Lady did for several years after her Marriage, leave in a separat State from her Husband, and that thereafter a second Settlement being made betwixt them, the Defunct had only 24 Chalders of Victual yearly of the said Joynture allowed to him, of which he never made 20 Chalders *effective*, the remainder being uplifted and disposed upon by her self, and that the Defunct during all his life, was necessitate to keep a separate Family for his Children and Servants, he alone being intertained in the Family with his Lady, whose Family did consist of her Children and Grand-children, and their Servants, and that no Servant that belonged to the Defunct were so much as allowed a Mail of Meat from her, during all that time.

As to what is further Represented in the Petition, in relation to the Process pursued before the Session, and to the Protestation for remeid of Law, and to what has since proceeded therein, the Defender shall not give his Grace and your Lordships the trouble to repeat the same, as being but a Narrative of the state of the Case above set down.

The Scope therefore of this Petition, and the Design of the giving in thereof, Resolves summarily, in this few Heads.

1. That in June 1656, there was a List of Debts given in, by the late Lord Collingtoun himself, which in the Condescendence before the Committee, bears, to extend to 300000 Merks, and which being standing out, unsatisfied the time of the Marriage, it necessarily follows, that the free Estate the Defunct left behind him, was purchased by Moneys acquired, during the Marriage, his Debts exceeding then the value of his Estate, and was payed by his Acquisitions, he being maintained in Family, upon the Ladies other Joynter.

2. That the 24. Chalder of Victual, that the Defunct uplifted out of the Lands of *Inter-teil*, did extend to upwards of 80000 Merks, during the Marriage, besides 140000 Merks, he received from the King in Sallaries and Pensions, as a Lord of the Session, and Justice-Clerk: And that thereby, the Debts before the Marriage, being payed, by the Acquisitions, during the Marriage. My Lady concludes, that she has Right to the Liferent thereof, and that the Estate he left behind him, being ten or twelve Thousand Merks yearly, in the Possession of the Defender, is to be understood the effects, that were extant at the Dissolution of the Marriage: And that therefore, the Defender ought to be Decerned, in Payment of the Bygones, and to put the Lady in Possession of the Estate of Collingtoun, during her Lifetime.

Before the Defender make any particular Answer to this point of the Petition, he Humbly offers to the Lord Commissioner his Grace, and the Honourable Estates of Parliament, that the Pursuer in all this Debate, had never the confidence to insist against the Defender, upon any passive Title, as representing his Father, because she knew, he could not be lyable personally. 2. From what is above said, it is clear, that he was an Anterior Creditor to his Father, and the Father in the Contract of Marriage with the Defenders Mother, is particularly obliged, to do no Fact or Deed, whereby the Heirs-Male of the Marriage, could be any ways prejudged, in the Right and Succession to the Lands of Collingtoun, and Teinds therein specified, and consequently, the Disposition of the Estate made to the Defender, depending upon a Cause prior to the Pursuers Contract of Marriage, which was most onerous, was sufficient *per se*, to evacuate any intervening, vagrant Clause of Conquest, in the Pursuers Contract. And that therefore, the Defunct being legally Denuded, in his own time of his Estate, in the Defenders favours, upon such an onerous Accompt: This Estate is not to be considered as the Defuncts, at the Dissolution of the Marriage, and consequently, not to fall under the compass of the Provision, in the Pursuers Contract, or of the Interlocutor of Parliament, in their remit to the Committee of Fynes and Forfaultures.

This being premised, It is Answered for the Defender, that as the Condescendence mentioned in the Petition, is extravagant, and given up at Random, so supposing it were true, in relation to the standing out Debts, the time of the Marriage, Yet the Conclusion inferred therefrom, arising from a stretched and lubrick Presumption, is easily Redargued, in following

ing the Pursuers own Method, by a true and genuine State of the Affair from thir Answers?
 1. Supposing the Debts of the Lord Collingtoun at his Marriage, did amount, as in the Condescendence to 30000 Merks, and the Real Estate belonging to him, whether in his own Possession, or of that of his Creditors, not amounting in the highest extant, to 11000 Merks yearly, this with regard to publick Burthens, and other necessary Deductions, does annually fall short in 8000 Merks, to pay the Annualrents of the Debt.

2. It is known, my Lord Collingtoun, for upwards of ten years, had only the Sallary, of an ordinary Lord of the Session, and this being joyned with the 24. Chalder of Victual, did make up at the highest but 6000 Merks yearly: So that still there is an annual inlack of 2000 Merks, which during these ten years, will do more, nor ballance any additional Access, the the Defunct had in his Sallaries, as Justice-Clerk.

3. The Defunct during the short time, the Lady and he cohabite together, stayed himself all alone in Family with her, and had a distinct and separate Family of his own, for his Children and Servants, which he was necessitat to maintain, and in the maintainance whereof, regard being had to his Quality, his Sallary, as a Lord of the Session, could not arise to defray the same: Besides, that he maintained the Defender his Son, for three years abroad, which are necessary Deductions, to diminish and lessen a vagrant Clause of Conquest.

4. There are several Debts yet lying out, for which, albeit the Defender now stands only bound, yet it is evident (as the Sun in the Firmament) they are Debts of the Fathers, because the Defender had no occasion to contract a six pence of Debt himself, and these as they are condescended upon, must likeways deduce out of this pretended Condescendence, given in by the Lady.

From which then, it is evident to a Demonstration, that the Defuncts condition being considered, as its affirmed by the Pursuer herself, to have been at his Marriage, and all the Incomes, during the Marriage, which the Pursuer calls the Acquisitions, being brought to a yearly Ballance: It is impossible, there could be any free Conquests, or any Estate extant, belonging to the Defunct, at the Dissolution of the Marriage, which can be considered as the effects and product of the said Conquests, and of the Joynter and Sallaries, that the Defunct is alledged to have received, during the Marriage, whereby this lubrick Presumption of the Pursuer, to the Conviction of the World, is Redargued, even though the Defender in his Answers, should yeild the Point as it is urged for her, and that consequently the Subsumption of the Bill in the Petition, not being proven in the Terms of the Interlocutor of Parliament: But running upon extravagant Notions and Suppositions, the same can never infer the conclusion of the Petition, or be ground in Law for the Parliament, to Decern the Defender, either as to Bygons, or as to putting the Lady in Possession, in time coming.

As the Defender then from what's above-said, does sufficiently elide the presumption urged for the Pursuer, so that my Lord Commissioner his Grace, and the Honourable Estates of Parliament, may truly know the Defenders circumstances, and what Estate he had from his Father, even laying aside the Defenders just Claim thereto, from his Mothers Contract of Marriage, he does ingenuously declare, that the Estate disposed to him by his Father, and whereof he is now in the Possession, did not at the time it was disposed in yearly Rent, amount to more than 3600 Merks, and which will evidently appear when Inquiry is made in the Affair, by an impartial Probation to be adduced by either Party.

2. The Defender shall prove *sub periculo causa*, that he has got by his own Marriage first and last, above 60000 Pounds Scots, which exceeds what Estate he had of his Father, and therefore it's left to the Justice of the Parliament to consider, whether or not the Defender has bought the Inheritance of his Fathers, *tanquam quilibet*, and that at the dearest Purchase in the Kingdom, and consequently, all things in relation to this Affair, being considered in the equal ballance of Justice, his Grace and your Lordships are to judge, upon what lubrick and extravagant grounds, the Pursuer supports the Justice of her Cause, and as the Lords of Session did determine conform to the current of Decisions, and with a regard to the whole merits of the Cause, so the Honourable Estates of Parliament are left to give their Opinion and Judgment, if there was any rational, legal, or just ground in the Pursuer, in all the steps of this Affair to have used such injurious Reflections upon the honour of that Judicatory, or to have raised such groundless Clamor and Noise, by such a Process as this is, which when considered at the bottom, it's hoped will be found, to be of little Weight or Moment. And therefore, the whole Affair lying now under the View and Consideration of the High Court of Parliament, who being to determine therein, in a Judicative Capacity, and as being the Fountain of all Justice, the Defender in the just confidence of the true merits of his Cause, has good ground to have neither fear nor apprehension of the great Pretensions, this Pursuer

has been pleased to intertain her self with, and humbly expects, after the great Trouble and Expences he has been put to, to be at last affoizied from a Proceſs of this nature, wherein, as there is no relevancy in point of Law, ſo there is much, calumniously alledged in matter of Faſt, as will appear from what is above-represented, and when a legal and impartial Tryal is taken, in relation to all the Circumstances of this Proceſs, eſpecially ſeing that by the Purſuers Contract of Marriage, whereupon this Plea is founded, the Lady beſide the ſpecial Provision in her favours therein, is only provided to the Liſerent of the Conqueſt, and the Children of the Marriage in Fee, which failzieing, to the ſaid Sir James his other Heirs, who are appointed to ſucceed him in his other Eſtate, and there being no other Eſtate but *Collingtoun* at the time of the Marriage, and the Lady all along acknowledging that her Huſbands Debts did exceed the value of his Eſtate, the time of the Marriage, it cannot be contraverted, but it was the meaning of Parties in the ſaid Contract, that the ſaids Lands of *Collingtoun* ſhould be relieved of the Debt, for the behove of the Heir of the firſt Marriage, and not to fall to the Heirs Male of the ſecond Marriage as Conqueſt, ſeing the words of the Contract are as clear as the Sun, that the Lands of *Collingtoun* are provided to the ſaid Sir James his Heirs of the firſt Marriage, and his applying as much of the Acquiſitions or Incomes, during the Marriage, for diſburdening the ſaids Lands of *Collingtoun* cannot at all be quarrelled, the ſame being ſo consequential to the meaning of Parties, otherwiſe the Reſervation in favours of the Heirs of the firſt Marriage, would be a ſham, and they to ſucceed to nothing : But ſuppoſe the ſaid Clause had not been, and which *per ſe* is ſufficient, yet the Lady cannot legally quarrel the Defenders Right to this Eſtate, ſeing he is able to prove, that he got more by his Lady as aforeſaid, than would have purchaſt an Eſtate of greater value, than what his Father diſponed to him as ſaid is, and if any difficulty remain with his Grace or your Lordſhips, the Defender humbly craves, that his Procurators may be heard in your own Preſence.

In Reſpect whereof, &c.

